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FILE
SEP 26
CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1952

No. 315

UNITED STATES OF AMERICA
Petitioner

vs.

ADAMS PACKING ASSOCIATION, Inc., et al
Respondents

BRIEF OF THE RESPONDENTS

In Opposition to Petition for Certiorari

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INDEX

Page

Statement of the Case 1

Argument 3

Conclusion 12

Table of Cases Cited

Coat Corporation of America vs. United States, Ct. Cls., July 15, 1952 7

Consolidated Vultee Aircraft Corp. vs. United States, 97 F. Supp. 948 7

James Graham Mfg. Co. vs. United States, 91 F. Supp. 715 7

Leeds & Northrup Co. vs. United States, 101 F. Supp. 999 7

Long vs. United States, 102 F. Supp. 134 7

MacDonald vs. United States, 113 Ct. Clos., 300 7

Maryland Steel vs. United States, 235 U. S., 451 8

Mathis vs. United States, 79 F. Supp. 703 7

Solomon vs. United States, 19 Wall 17 ..... 8, 10

United States vs. Corliss Steam Engine Co., 91 U. S. 321 8

United States vs. Koplen, Same vs. LaGrange Grocery Company, Same vs. West Point Grovery Co., 24 F. 2d, 840 and 30 F 2d, 941 10

United States vs. Mason & Hanger Co., 260 U. S., 323 ..... 7, 8, 9

United States vs. Moorman, 338 U. S., 457 7

United States vs. Wunderlich, 342 U. S., 98 6

Statutes and Orders

First War Powers Act, 55 Stat. 838, 50 U.S.C. App. 611 4

Executive Order 9001, 6 F. R. 6787 4

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STATEMENT OF THE CASE

The contract upon which petitioner sues was executed for the United States by Lt. Grafft, commanding officer of the prison of war camp and contracting officer (R-10, 11 & 19), and was authorized and negotiated under the First War Powers Act and Executive Order No. 9001 (R-12 and Petition, page 3). The petitioner is seeking to recover the difference between the prevailing price for labor and the reduced price allowed because of the inefficiency of the prison labor furnished.

The facts, as shown by the affidavits of C. C. Street, R. C. Lewis and Lt. Grafft, petitioner's contracing officer, filed in support of respondent's motion for summary judgment, are uncontrovered (R-53, 57 & 60). Petitioner offered nothing to counter these facts.

About the time the contract was being negotiated it was recognized by the members of the Association and Lt. Grafft, contracting officer and commanding officer of the prisoner of war camp, that the prisoners of war to be furnished by petitioner were inefficient in their work, and, therefore, a lesser pay rate than that prevailing would be justified. Several meetings were held between members of the Association and Lt. Grafft, and other government officials, discussing and negotiating the percentage to be allowed as a deduction for inefficiency from the prevailing wage rate. After a thorough investigation by government officers it was agreed between Lt. Grafft and members of the Association that twenty-five per cent deduction would be allowed (R. 53-61).

In accordance with the agreement the members of the Association were charged and periodically billed at the rate of 37½ cents per man hour from April 4, 1944, to June 15, 1944, for prison labor furnished to them by petitioner, this rate representing 25 per cent reduction. These charges were paid (R. 53-61).

Approximately two years after this transaction the General Accounting Department of the Office of the Comptroller General took issue and called upon the members of the Association to pay the difference (R. 12 & 44).

The effect of the summary judgment entered by the District Court and affirmed by the Court of Appeals is that Lt. Grafft was acting within his authority in allowing the inefficiency reduction.

ARGUMENT

The questions presented for determination by petitioner are misleading. The basic question is whether or not petitioner's contracting officer had authority to allow the inefficiency reduction, whether it be by virtue of the First War Powers Act and Executive Order 9001, the original contract itself, or otherwise.

It is important to note that petitioner offered nothing in opposition to respondents' motion for summary judgment to show that Lt. Grafft had no express authority to allow this reduction. To the contrary, the facts disclose that it was only after several meetings and discussions between Lt. Grafft and other government officials and respondents, and after an investigation by government officials, that the reduction was allowed. Lt. Grafft did not take it upon himself to allow for inefficiency as petitioner would have the Court believe. Lt. Grafft states that he entered the supplemental agreement under his authority as commanding officer and as contracting officer for the United States (R. 53-61).

The record is devoid of facts that would show that Lt. Grafft's superiors, or the department whom he repsented, rejected or disputed his supplemental agreement. It was not until the matter came into the hands of a separate and distinct agency of the United States, the General Accounting Department of the Office of the Comptroller General, that this suit was instituted.

Thus, it is seen that the petition ignores these facts and is based upon the bold supposition that Lt. Grafft had no express authority to allow the reduction, a supposition having no support from the record.

The petitioner contends that the broad powers delegated by the First War Powers Act and Executive Order 9001 was never conferred upon Lt. Grafft, the contracting officer. Yet the contract, which is the basis of Petitioner's suit, was entered into pursuant to, and was authorized by and negotiated under, the provisions of the First War Powers Act *(55 Stat. 838, 839, 50 U. S. C. App. 611)*, and Executive Order No. 9001 *(6 F. R. 6787)*. This petitioner cannot dispute for it alleged in its complaint:

> "Said contract was authorized by and negotiated under Act of Congress designated as Public No. 354, 77th Congress, and Executive Order No. 9001." (R. 12).

Again this authority was admitted in the petition on page 3.

The Act and Executive Order were emergency measures, enacted and issued to facilitate the prosecution of the war and to expedite the making of Government contracts.

Section 1 of the Act provides that the President, in order for a more effective exercise and more efficient administration of his powers, is authorized to make a redistribution of functions as he deems necessary.

Under Title II; Section 201, of the same law the President was empowered to authorize any department or agency "to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made and to make advance, progress and other payments theron, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts."

Pursuant to this Act the President issued Executive Order No. 9001. This Order authorized the War Department, Navy Department and U. S. Maritime Commission to enter into contracts, and into amendments and modifications thereof, and to make advance, progress, and other payments thereon, without regard to the law relating to the same. Also, it provided that the contracts authorized to be made included agreements of all kinds without restriction of any kind, either as to type, character, location or form. Further, it stated that the departments named could modify or amend or settle claims under contracts and could modify or release accrued obligations of any sort, and that amendments or modifications could be *with or without consideration.* This Order expressly provided that the authority conferred therein could be exercised by the various departments or in their discretion and by their direction could also be exercised *by any officer,* officers or civilian officials thereof.

In the face of this broad delegation of authority conferred by the President and in the face of the admitted authority of Lt. Grafft by virtue of said delegation to enter into the contract in Petitioner's behalf, the Petitioner now disclaims the authority of their agent, Lt. Grafft.

Certainly, since Lt. Grafft negotiated and entered into the original contract on behalf of Petitioner by virtue of said Act and Executive Order, there had to be a delegation of this authority to him.

How can the Government in one breath adopt the action of an agent and in the other disclaim such? If this be true, the Government could at any time accept that part of a contract most favorable but reject that part unfavorable, and no settlement would bind the Government.

Furthermore, this written contract, admitted to exist by virtue of the Act and Executive Order, clearly shows the authority conferred upon the contracting officer, Lt. Grafft. Section 11 of that contract provides that all disputes of fact *"which are not disposed of by mutual agreement, shall be decided by the contracting officer."* (R. 9 & 18). This gave to the contracting officer full authority to settle disputes whose decision was final unless appealed within the time allowed. In the present case the dispute was settled by mutual agreement. There is no provision making the officer's decision contingent upon the approval by the Government.

Petitioner argues that since this standard disputes clause existed in Government contracts prior to the enactment of the War Powers Act it had no reference to the Act. However, it is axiomatic that all contracts, even those of the United States, are to be construed in the light of the applicable law at the time of the making, and such law becomes a part thereof. Here, at the time of the execution of the original contract the First War Powers Act and Executive Order 9001 were in existence. Since it is admitted that the contract was entered into pursuant to the Act and Executive Order, this dispute clause, as well as other provisions, clearly shows that Lt. Grafft's authority extended to more than merely taking his pen in hand and signing his name.

It is a well settled rule of this Court that a decision by the contracting officer made under such a provision is final and conclusive and can only be set aside for fraud. See *United States v. Wunderlich (1951) 342 U. S. 98.*

It is equally well settled that the powers of the Comptroller General are extensive and broad, but he does not in the absence of fraud or overreaching have

authority to determine the propriety of contract payments when the contracts themselves vest final power of determination in the contracting officer. See *United States v. Mason & Hanger Co., 260 U. S. 323; United States v. Moorman, 338 U. S. 457; Long v. United States 102 F. Supp. 134; Leeds & Northrup Co. v. United States, 101 F. Supp. 999; Consolidated Vultee Aircraft Corp. v. United States, 97 F. Supp. 948; James Graham Mfg. Co. v. United States, 91 F. Supp. 715; and Mathis v. United States, 79 F. Supp. 703.*

Next, Petitioner attempts to invoke the Court's jurisdiction because of an alleged conflict between the ruling in the present case and that of the Court of Claims in *Coat Corporation of America v. United States, C. Cls.* decided July 15, 1952, and in *MacDonald v. United States, 113 C. Cls. 300.* Although we do not believe such a conflict, if it existed, would be substantial enough to justify the Court in granting certiorari, a close analysis of these cases dispels any conclusion of conflict.

In the *Coat Corporation of America case,* supra, the contract provided for termination in the event of delays in delivery, and the contract was terminated because of delay. The attempted revision was subsequent to the termination and revised prices on goods already delivered. Any authority the contracting officer held by virtue of the contract ended with its termination.

In the case at hand the original contract entered into by the contracting officer pursuant to the First War Powers Act and Executive Order 9001 was existing and not in default at the time of the modification. Here the price was revised not on deliveries previously made but on future deliveries because of the acknowledged inefficiency of the work performed by war prisoners.

The question was never decided in the *MacDonald case, supra,* and therefore, it creates no conflict nor is it authority for the case at bar.

Regardless of the First War Powers Act and Executive Order 9001, the holdings of this Court in *United States v. Corliss Steam Engine Co., 91 U. S. 321; United States v. Mason & Hanger Co., 260 U. S. 323; Maryland Steel v. United States, 235 U. S., 451;* and *Solomon v. United States, 19 Wall. 17,* provide ample authority to sustain the lower Court's rulings.

In *United States v. Corliss Steam Engine Co. supra,* the Navy Department, on recommendation of a board of officers suspended work under a contract with claimant. The claimant made a proposed settlement which was accepted by the Navy Department. As to the authority of the Navy to make such a settlement it was said:

> "If such a settlement, as the Chief Justice of the Court of Claims very justly observes, accompanied by the giving up by one, and the taking possession by the other of the property involved, cannot be Judicially maintained, it would seem that no settlement by any contractor with the Government could be considered a finality against the Government.
>
> When a settlement in such a case is made upon a full knowledge of all the facts, without concealment, misrepresentation or fraud, it must be equally binding upon the Government as upon the contractor; at least, such a settlement cannot be disregarded by the Government without restoring to the contractor the property surrendered as a condition of its execution."

Maryland Steel v. United States, supra. Plaintiff sued for balance due on contract with Government for construction of a vessel. The contract had a time limit

for completion and provided a penalty of so much a day if not completed in time. The Quartermaster General agreed to extend this time. The Government claimed that he had no such authority and set up the penalty by way of set-off. It was held that Quartermaster had authority:

> "The case at bar is a case of contract authorized by law necessarily entered into and conducted by the officers of the government, and as necessarily they must have had the power to make it effective in its beginning and progress. The court of claims recognized this and found that the Quartermaster General, United States Army, within his discretion under the contract orally waived the time limit in said contract."

In *United States v. Mason & Hanger Co., supra,* the plaintiff sued the United States for recovery of an amount paid for a bond alleged to be due under a cost plus contract for construction of a building and which amount the contracting officer had allowed. Article 4 of the contract provided that upon a disagreement the decision of the contracting officer shall govern. The Court said:

> "The officer in a sense, is a party to the contract, not only representing but speaking for the impersonality of the government. Competent, therefore, it would seem, to declare the meaning of the contract."
>
> "We have decided that the parties to the contract can so provide, and that the decision of the officer is conclusive upon the parties (citation omitted). *This is extending the rule between private parties to the government.*
>
> "There were such decisions, and settlement and payments in consequence of them, as we have seen. *Over the effect of these the Comptroller of the*

Treasury has no power. They were the acts and duty of the officer in charge, in the expression of which there was no ambiguity and were, therefore, conclusive in effect."

In *Solomon v. United States, supra,* it was held that the *Act of 1862 1 Stat. at 411,* requiring contracts for military supplies to be in writing was not infringed by the officer in charge accepting delivery after the date stipulated in the contract nor was a verbal agreement to extend time of performance invalid.

In *United States v. Koplen, Same v. LaGrange Grocery Co., Same v. West Point Grocery Co., 23 F. 2d. 840, (D. C. Ga.)* an auction sale was held by the Governemnt for the disposition of surplus property under the direction of one Capt. Hern, Surplus Property Control Officer. Memoranda of the sales were made, signed by Capt. Hern and acknowledged by the purchasers. When the goods were delivered they were refused by the purchaser as not being those sold. Thereupon, the local Board cancelled the memoranda and issued others redescribing the property and fixing a lower price, which was paid by the purchaser. The Government brought suit to recover balances alleged to be due for the goods sold. The Government contended that the local Board had no authority to adjust the dispute. It was said:

"More specifically the Act of July 11, 1919 (5 USCA § 221), provided: 'The Secretary of War be, and he is hereby authorized to sell any surplus supplies . . . upon such terms as may be deemed best.' *This authority like many others whose exercise requires much detail, was necessarily to be exercised through agents."*

"I think the true line of the executive officer's powers of adjustment in matters which he is conducting must be drawn at what is really necessary

to enable him to carry to a conclusion the act which he has authority to perform. If his only authority is to conclude a contract, he cannot, after making it, revise it, or make another. If he has authority also to supervise its execution, he has a measure of discretion as to how to exact an execution he will require. The question is really one of a fair estimate of the power intended to be intrusted to him.

"Now in the present case the Secretary of War, through the officers to whom he had delegated the power, was authorized to sell the surplus property. This power was not executed by merely making contracts of sale, but extended to the full execution of the sale by delivering the property and collecting the price. If, after a contract for the sale of articles was made, the contract could not be carried out because of reasonable dispute as to its existence or terms, the congressional intent must have been that an adjustment or a new contract should be made; otherwise, it could not be said that a sale had been effected, and certainly the proceeds could not be covered into the Treasury. . . . Therefore the fact that the adjustment may amount to a new contract, or even take that form, as it did in this case, is not unlawful. If the agents of the Secretary determined that, because of mistake, inability or failurt to deliver goods as decribed, or other just reason, an attempted sale has failed, another one on other terms was appropriate. It was altogether desirable and necessary that such matters be settled at once and by the persons having knowledge of them, so that the property might be sold to others, if need be. These things are fairly included in the authority to sell the property."

We believe that the reasoning applied in the above case forms a just conclusion for the present controversy.

CONCLUSION

We respectfully submit that Lt. Grafft, the contracting officer, had ample authority to modify the contract to account for the failure of the efficiency of war labor furnished by petitioner to equal that of prevailing labor. The petition for certiorari should be denied.

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